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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 520

CASSIUS MCDONALD, PETITIONER

v.

ROBERT H. HUDSPETH, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 381–392) is reported at 120 F. (2d) 962. The findings of fact and conclusions of law of the District Court (R. 79–82) are unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 12, 1941 (R. 392), and a petition for rehearing was denied July 17, 1941 (R. 404). The petition for writ of certiorari was filed August 18, 1941. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States District Court for the District of Minnesota was without jurisdiction, under the Sixth Amendment, to try petitioner upon an indictment charging a conspiracy in violation of the Federal Kidnapping Act.

2. Whether petitioner was denied the effective assistance of counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed.

The pertinent provisions of the Federal Kidnapping Act are—

18 U. S. C., sec. 408a:

> Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ranson or reward or otherwise, * * * shall, upon conviction, be punished * * *.

18 U. S. C., sec. 408c (as it was at the time petitioner was indicted):

> If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of sections 408a and 408b of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as provided for by said sections.

STATEMENT

Petitioner was convicted (R. 41) in the United States District Court for the District of Minnesota upon an indictment charging a conspiracy in violation of the Federal Kidnapping Act, in connection with the kidnapping of one Edward George Bremer (R. 54–61). As shown by the indictment (R. 37–40) and the evidence at the criminal trial (*McDonald* v. *United States,* 89 F. (2d) 128 (C. C. A. 8)), petitioner's role in the kidnapping scheme was that of money changer, there being evidence that he made several trips from Miami to Havana to exchange ransom money for gold and other United States currency. He was sentenced to fifteen years' imprisonment (R. 42). Upon appeal petitioner's conviction was affirmed (*McDonald* v. *United States, supra*), and after a rehearing was refused, this Court denied his petition for writ of certiorari (301 U. S. 697). This Court also denied a petition for rehearing (302 U. S. 773) and a petition for a writ of error *coram nobis* (303

U. S. 622). Neither of the questions now presented was urged at any stage of these proceedings (Pet. 4).

The present proceeding arises upon an application for writ of *habeas corpus* filed by petitioner in the United States District Court for the District of Kansas seeking his release from the Leavenworth Penitentiary, where he had been confined for two and one-half years (R. 9–17, 21–23, 25–30, 86).

The evidence at the *habeas corpus* proceeding bearing upon petitioner's claim that he was denied the effective assistance of counsel may be summarized as follows:

Petitioner was represented prior to trial and after the verdict of guilty by John A. Burns, a member of the Bar of the United States District Court for the District of Minnesota (R. 88–90, 232–233). At the trial petitioner was represented by Everett Jennings, an attorney of Chicago, Illinois, who had been retained by petitioner's wife and paid $5,000 for his services (R. 226–229). Jennings was present throughout the trial except for twenty minutes at the opening of court on the day the jurors were selected (R. 243–244; see also R. 197–198, 216). At that time petitioner consented that attorneys for the other defendants represent him in connection with the impaneling of the jury (R. 244).

The alleged intoxication of petitioner's counsel and his asserted incapacity effectively to repre-

sent him was testified to by petitioner (R. 106–109) and his testimony was substantiated to a certain extent by that of attorneys representing other defendants (R. 181–189, 196–220). Any indication of intoxication or incapacity was, however, denied by the trial judge (R. 165–173), the then United States Attorney who conducted the trial, now a United States District Judge (R. 176–181), the Assistant United States Attorney who aided him (R. 162–165), and four deputy United States Marshals who were present in the courtroom throughout the trial (R. 173–176, 181, 187–188). In addition there was introduced by respondent a transcript of the proceedings at petitioner's trial which indicates to us that Jennings conducted petitioner's defense capably and vigorously (R. 242–316). While petitioner testified that on several occasions his counsel was led out of the courtroom by a marshal (R. 106), this testimony is not supported by that of any of the marshals present or of any other witness.[1]

Petitioner admits that he never called the trial court's attention to the alleged intoxication of his counsel (R. 109, 112–113). Nor did he at any time request that court to continue the trial until he could bring in other counsel (R. 111–112, 169, 244). According to his own testimony petitioner was, at the time of trial, a man in his fifties who

[1] With reference to a particular incident to which petitioner apparently refers, see the testimony of the trial judge (R. 166, 171).

had attended two universities and had managed a personal estate in excess of one million dollars (R. 86).

The District Court held that the United States District Court for the District of Minnesota was, under the Sixth Amendment, without jurisdiction to try petitioner and that petitioner's attorney was so under the influence of liquor throughout the trial that he was wholly incompetent and ineffective on petitioner's behalf, with the result that the latter was denied his constitutional right to the assistance of counsel (R. 79–82). The court thereupon ordered the petitioner discharged from custody (R. 83). Upon appeal the Circuit Court of Appeals unanimously reversed the decision of the District Court (R. 381–392) and directed that petitioner be returned to the custody of respondent (R. 392).

ARGUMENT

I

Petitioner contends that under the Sixth Amendment the United States District Court for the District of Minnesota lacked jurisdiction to try him, apparently because the only overt acts attributed to him in the indictment were charged to have been committed in Florida and Cuba and because, notwithstanding that the indictment charged him with conspiring with the kidnappers in Minnesota, there was no proof at the criminal trial that he was ever in Minnesota or in com-

munication with anyone there (Pet. 11–15). Petitioner's contention misconceives fundamental principles well established in the law of conspiracy.[2]

It is elementary that all of the parties in a conspiracy indictment may be tried either in the jurisdiction in which the illicit understanding was entered into or in any district in which any of the conspirators committed any of the overt acts named in the indictment. *Hyde* v. *United States,* 225 U. S. 347; *Brown* v. *Elliott,* 225 U. S. 392, 402; *Hyde* v. *Shine,* 199 U. S. 62, 76.[3] It is equally well settled that one who knowingly cooperates to further the objects of a conspiracy becomes a party thereto, and this regardless of whether all the conspirators are acquainted with each other or had direct contact with all the others. *Allen* v. *United States,* 4 F. (2d) 688, 698 (C. C. A. 7), certiorari denied *sub nom. Mullen* v.

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[2] Since petitioner's contention is clearly without merit, it is assumed *arguendo* that the question presented need not be raised *in limine* (*Strewl* v. *United States*, 99 F. (2d) 474, 477–478 (C. C. A. 2)), and that it may be examined on *habeas corpus* even though, in part at least, it involves an inquiry into facts which essentially were the subject of consideration in the petitioner's criminal trial (Cf., however, *Bowen* v. *Johnston*, 306 U. S. 19, 25–26).

[3] See also *Palmero* v. *United States*, 112 F. (2d) 922, 926 (C. C. A. 1); *Chew* v. *United States*, 9 F. (2d) 348 (C. C. A. 8); *Sloan* v. *United States*, 31 F. (2d) 902 (C. C. A. 8); *Yenkichi Ito* v. *United States*, 64 F. (2d) 73, 76 (C. C. A. 9); *Shea* v. *United States*, 236 Fed. 97 (C. C. A. 6); *United States* v. *Wells*, 192 Fed. 870.

United States, 267 U. S. 598; *Booth* v. *United States,* 57 F. (2d) 192, 197 (C. C. A. 10); *Martin* v. *United States,* 100 F. (2d) 490, 496 (C. C. A. 10), certiorari denied, 306 U. S. 649. A conspirator need not understand the entire scope of the conspiracy and his knowledge may be limited as to its extent and details, it being sufficient if one becomes a member of a conspiracy knowing its purposes in a general way and acts with his fellow conspirators to a greater or lesser extent. *McDonnell* v. *United States,* 19 F. (2d) 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States,* 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States,* 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Marino* v. *United States,* 91 F. (2d) 691, 696 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States,* 302 U. S. 764. One joining a criminal conspiracy becomes equally as guilty as those who were in it at its formation and is equally as accountable for the overt acts performed prior to his membership in the conspiracy as are the original conspirators. *Manton* v. *United States,* 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *McDonald* v. *United States,* 89 F. (2d) 128, 133 (C. C. A. 8), *supra; Laska* v. *United States,* 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Marino* v. *United States,* 91 F. (2d) 691, 696 (C. C. A. 9); *Baker* v. *United States,* 21 F. (2d) 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621.

On the face of the indictment it cannot be doubted that the United States District Court for the District of Minnesota had jurisdiction to try petitioner. The indictment charged a conspiracy which involved not only the kidnaping of Bremer and his transportation and holding for ransom but the exchanging of the ransom money for safe money (R. 35–37), petitioner's role being that of exchanger of the ransom money (R. 40). The indictment specifically alleged that the conspiracy was entered into in the District of Minnesota as well as elsewhere; that petitioner was one of the conspirators (R. 34), and that overt acts relating to the kidnaping occurred in that district (R. 37–39).

While the proof did not disclose that petitioner joined the conspiracy at its inception (*McDonald* v. *United States,* 89 F. (2d) at 132), it was determined in his criminal proceeding that the conspiracy endured until the ransom money was exchanged; that there was sufficient evidence to warrant the jury in finding that petitioner came into the conspiracy before its final object had been accomplished (*id.,* p. 133), and that in exchanging the ransom money he acted with knowledge (*id.,* pp. 138–139). It also cannot be denied that the evidence disclosed that Bremer was kidnaped in St. Paul (*id.,* p. 131) and therefore that the overt acts relating to the kidnapping were committed in that district.

Consequently it is abundantly clear that both on the face of the indictment and under the proof the United States District Court for the District of Minnesota had jurisdiction to try petitioner.

II

Petitioner's contention that he was denied the effective assistance of counsel (Pet. 15–18) must be measured by the rule that when collaterally attacked a judgment of conviction carries with it a presumption of regularity, and that consequently a heavy burden of proof rests upon a petitioner assailing such a judgment. *Johnson* v. *Zerbst,* 304 U. S. 458, 466. In the light of these salient principles, we submit that the District Judge was clearly unjustified in finding from the testimony that petitioner had established by a preponderance of the evidence that his attorney was "constantly incapacitated and under the influence of liquor throughout the trial to the extent that he was wholly incompetent and ineffective on petitioner's behalf" (R. 82). Even if the testimony on behalf of the petitioner went so far, which we do not believe it does, the alleged drunkenness of petitioner's attorney and his incapacity were unequivocally denied by the trial judge, the United States Attorney, the Assistant United States Attorney and four Deputy United States Marshals. Their testimony was supported not only by the presumption of regularity inherent in the judg-

ment of conviction but by what seems to us to be undeniable evidence of skill and ability on the part of his counsel in conducting petitioner's defense reflected in the transcript of the proceedings at the criminal trial introduced by the respondent. Petitioner indubitably did not meet his burden of proof.

Moreover, the *habeas corpus* court omitted to find certain indisputable facts which rendered nugatory any holding that petitioner was denied the effective assistance of counsel. These are that petitioner's counsel was not appointed by the court but was selected by his wife and paid $5,000 for his services and that, although petitioner is a man of intelligence, education and wide business experience, he at no time called the attention of the trial judge to the alleged drunkenness of his counsel or requested that he be permited to have other counsel represent him. If petitioner lacked the effective assistance of counsel because of intoxication or mismanagement of his defense, which plainly he did not, this certainly was not, as the Circuit Court of Appeals has pointed out (R. 39), because of any denial of such a right.

Petitioner and the District Judge place some emphasis upon the fact that petitioner's attorney did not allow him to testify and did not place on the stand witnesses he had produced (Pet. 17, R. 82). This may, of course, have been motivated by a complex of strategical considerations, and there

is nothing in the record which discloses that petitioner made any claim to the trial court that his interests were not being protected.

CONCLUSION

The petition for writ of certiorari presents no question requiring review by this Court. It is therefore respectfully submitted that it should be denied.

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